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FILE *Security 4*

OGC Has Reviewed

20 AUG 1971

MEMORANDUM FOR: Mr. William H. Rehnquist
Chairman, Security Review Committee

SUBJECT : Safeguarding Official Information in the
Interests of the Defense of the United
States (Executive Order 10501 as
amended)

I referred your memorandum entitled "Department of Justice Submission Relating to Tightening Protection of Classified Documents," dated 5 August 1971 to our Office of General Counsel for review. Their comments are set forth below:

"We have reviewed with considerable interest the memorandum of 5 August 1971 from Mr. William H. Rehnquist to Members of the Interdepartmental Security Review Committee. We too have looked at the British Official Secrets Act over the years to see if we could glean any thoughts which would have application in the United States. As you are well aware, however, one of the big difficulties is that the Official Secrets Act is promulgated in the context of an unwritten constitution and the concept of "crown privilege." If, however, the Official Secrets Act were transposed into U. S. law it undoubtedly would be unconstitutional.

"On the other hand, certain of the objectives which are set forth in the Rehnquist memorandum appear to be not only desirable but feasible. We believe that most of the objectives he mentions, as well as other desirable improvements in U. S. law, will be found in the attached proposed revisions of certain sections of the Proposed New Federal Criminal Code incorporated in the "Final Report of the National

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Commission on Reform of Federal Criminal Laws."
These revisions will be transmitted shortly to the Criminal Code Revision Unit, Department of Justice. We have had preliminary discussions with members of that Unit, indicating that we had some concern about certain provisions of the Proposed New Federal Criminal Code.

"In particular, we would like to mention section 1115 of the Proposed Code, which is entitled, "Communication of Classified Information by Public Servant." Basically this section is derived from 50 U. S. C. 783 (b), the statute under which Scarbeck was convicted. Of particular interest is the fact that the District Court held, and the Circuit Court affirmed, that whether the document passed by Scarbeck was properly classified was not an issue to be determined by the court. Consequently, no argument by defense counsel was permitted on this issue.

"For a number of years this Agency has been interested in broadening section 783 (b) to make it a crime not only for a public servant to pass classified information to an agent or representative of a foreign government or to an officer or member of a Communist organization, but also to make it a crime to pass classified information to an "unauthorized person." Language to accomplish this was approved by the Assistant Attorney General, Internal Security Division, Department of Justice, by letter dated 18 October 1968 to CIA.

"We believe the other revisions which we have proposed would substantially improve existing law as well as retain certain provisions of existing law which were eliminated in the Proposed New Federal Criminal Code."



CIA Member

STAT

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Attachment:

Proposed Revisions of the Proposed New Federal Criminal Code

cc: Mr. Howard C. Brown, Jr. - AEC
Mr. Joseph I. Lieblich - Defense
Mr. William D. Blair, Jr. - State
Mr. Thomas K. Latimer - NSC

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**SUBJECT: Safeguarding Official Information in the Interests of
the Defense of the United States (Executive Order
10501, as amended)**

CONCURRENCES:

15/ John S. Warner
for **Lawrence R. Houston**
General Counsel

20 AUG 1971

Date

SIGNED

John W. Coffey
Deputy Director
for Support

20 AUG 1971

Date

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1 - AD/Security

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TAB

§109. General Definitions.

(af) "public servant" means an officer or employee of a government or a person authorized to act for or on behalf of a government or serving a government as an adviser or consultant. The term includes Members of Congress, members of the state legislatures, Resident Commissioners, judges, ~~and~~ jurors, and members of the military services;

§1112. Espionage.

(1) Offense. A person is guilty of espionage if he:

(a) reveals classified national security information to a foreign power or agent thereof with intent that such information be used in a manner prejudicial to the safety or interest of the United States; or

(b) in time of war, elicits, collects or records, or publishes or otherwise communicates classified national security information with intent that it be communicated to the enemy.

(2) Grading. Espionage is a Class A felony if committed in time of war or if the information directly concerns military missiles, space vessels, satellites, nuclear weaponry, early warning systems or other means of defense or retaliation against catastrophic enemy attack, war plans, or any other major element of defense strategy, including ~~secret~~ intelligence. Otherwise espionage is a Class B felony.

(3) Attempt and Conspiracy. Attempted espionage and conspiracy to commit espionage are punishable equally with the completed offense. Without limiting the applicability of section 1001 (Criminal Attempt), any of the following acts is sufficient to constitute a substantial step under section 1001 toward commission of espionage under subsection (1)(a): obtaining, collecting, or eliciting classified national security information or entering a restricted area to obtain such information.

(4) Definitions. In this section:

(a) "classified national security information the dissemination of which has been restricted by classification by the President or by the head of a United States Government agency with the approval of the President as affecting the security of the United States regarding:

(i) the military capability of the United States or of a nation at war with a nation with which the United States is at war;

(ii) military or defense planning or operations of the United States;

(iii) military communications, research or development of the United States;

(iv) restricted data as defined in 42 U.S.C. §2014 (relating to atomic energy);

(v) ~~security~~/intelligence of the United States, including information relating to intelligence operations, activities, plans, estimates, analyses, sources and methods;

(vi) ~~classified communications information as defined in~~
~~section 114~~/in time of war, any other information relating to national ~~defense~~/ security which might be useful to the enemy;

(vii)

(b) "military" connotes land, sea or air military and both offensive and defensive measures;

(c) "foreign power" includes any foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States, any international organization, and any armed insurrection within the United States.

(d) "agent" means representative, officer, agent or employee or, in case of a nation, a subject or citizen.

§1113. Mishandling Classified National Security Information.

A person is guilty of a Class C felony if /h/h/ted/kles/ d/stegrd/d/d/ potential injury to the/national security/d/the United States/ he:

- (a) knowingly reveals classified national security information to anyone not authorized to receive it;

- (b) violates a known duty, to which he is subject as a public servant, as to custody, care or disposition of classified national security information or as to reporting an unlawful removal, delivery, loss, destruction, or compromise of the security of such information; ~~67~~

- (c) ~~knowingly~~/having lawful possession of a document or thing containing classified national security information, fails to deliver it on demand to a public servant of the United States entitled to receive it; or

- (d) having unauthorized possession of or control of a document
or thing containing classified national security information, knowingly
retains the same and fails to deliver it to a public servant entitled to
receive it.

"Classified national security information" has the meaning prescribed in section 1112(4).

§1114. ~~Whistle/Of Classified Communications Information/~~

Disclosure of Classified Communications Intelligence and
Classified Cryptographic Information.

(1) Offense. A person is guilty of a Class ~~K~~/A felony if he knowingly:

(a) communicates classified communications ~~information~~/
intelligence or classified cryptographic information or otherwise
makes it available to an unauthorized person;

(b) publishes classified communications ~~information~~/intelligence
or classified cryptographic information; or

(c) uses classified communications ~~information~~/intelligence or
classified cryptographic information in a manner prejudicial to
the safety or interest of the United States.

(2) Attempt and Conspiracy. Attempt and conspiracy to violate
this section are punishable equally with the completed offense.

(3) Definitions. In this section:

(a) "communications intelligence or classified cryptographic
information" means information:

(i) regarding the nature, preparation or use of any code,
cipher or cryptographic system of the United States or of a
foreign power;

(ii) regarding the design, construction, use, maintenance or repair of any device, apparatus or appliance used or prepared or planned for use by the United States or a foreign power for cryptographic or intelligence surveillance purposes;

(iii) ~~regarding the intelligence/surveillance activities of the United States or a foreign power; or~~ regarding the communications intelligence or communications security activities of the United States or a foreign power; or

(iv) obtained by the process of communications intelligence ~~surveillance~~ from the communications of a foreign power;

(b) ~~Communications~~ information is "classified" if, at the time the conduct is engaged in, the ~~communications~~ information is, for reasons of national security, specifically designated by a United States government agency for limited or restricted dissemination or distribution;

(c) "communications security activity," "code," "cipher" and "cryptographic system" include, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance or means of communications;

(d) "communications intelligence ~~§ 112(4)(A)~~" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

(e) "unauthorized person" means a person who, or agency which, is not authorized to receive communications intelligence or classified cryptographic information by the President or by the head of a United States government agency which is expressly designated by the President to engage in communications intelligence ~~§ 112(4)(A)~~ activities for the United States;

(f) "foreign power" has the meaning prescribed in section 1112(4).

(4) Congressional Use. This section shall not apply to the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States or joint committee thereof. Inapplicability under this subsection is a defense.

§1115. Communication of Classified Information by Public Servant.

(1) Offense. A public servant or former public servant is guilty of a Class C felony if he communicates classified information to an agent or representative of a foreign government or to an officer or member of an organization defined in 50 U.S.C. §782(5) (communist organizations) or to an unauthorized person. The term "unauthorized person" means any person or agency not authorized by the President or by the head of a government agency with the approval of the President to receive such classified information. "Classified information" means information the dissemination of which has been restricted by classification by the President or by the head of a United States government agency with the approval of the President as affecting the security of the United States.

(2) Defenses.

(a) It is a defense to a prosecution under this section that the public servant or former public servant was specifically authorized by the President or by the head of the United States government agency which he served to make the communication prohibited by this section.

(b) It is an affirmative defense to a prosecution under this section that the former public servant obtained the information in a manner unrelated to his having been a public servant or, if not so obtained, it was not classified while he was a public servant.

§1130. Injunction Proceedings.

Whenever in the judgment of the head of a government agency any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of sections 1112, 1113, 1114 and 1115, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the head of a government agency that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

§1352. False Statements.

(1) False Swearing in Official Proceedings. A person is guilty of a Class A misdemeanor if, in an official proceeding, he makes a false statement, whether or not material, under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, if he does not believe the statement to be true.

(2) Other Falsity in Governmental Matters. A person is guilty of a Class A misdemeanor if, in a governmental matter, he:

(a) makes a false ~~written~~/statement, ~~when the statement is~~
~~material~~ and he does not believe it to be true;

(b) intentionally creates a false impression in a written application for a pecuniary or other benefit, by omitting information necessary to prevent a material statement therein from being misleading;

(c) submits or invites reliance on any material writing which he knows to be forged, altered or otherwise lacking in authenticity;

(d) submits or invites reliance on any sample, specimen, map, boundary-mark or other object which he knows to be false in a material respect; or

(e) uses a trick, scheme or device which he knows to be misleading in a material respect.

(3) Statement in Criminal Investigation. This section does not apply to information given during the course of an investigation into possible commission of an offense unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information. Inapplicability under this subsection is a defense.

(4) Definition. A matter is a "governmental matter" if it is within the jurisdiction of a government agency or of an office, agency or other establishment in the legislative or the judicial branch of government.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in:

(a) subsection (1) when the official proceeding is a federal official proceeding:

(b) subsection (2) when the government is the government of the United States, or when the government is a state or local government and the falsity constituting the offense is that a person is a citizen of the United States.

§1381. Impersonating Officials.

(1) Offense. A person is guilty of an offense if he falsely pretends to be:

(a) a public servant or foreign official and acts as ~~if he~~
~~exercises the authority of~~ such ~~public servant or foreign official~~; or

(b) a public servant or a former public servant or a foreign official and thereby obtains a thing of value.

(2) Defense Precluded. It is no defense to prosecution under this section that the pretended capacity did not exist or the pretended authority could not legally or otherwise have been exercised or conferred.

(3) Definition. In this section "foreign official" means an official of a foreign government of a character which is customarily accredited as such to the United States, the United Nations or the Organization of American States, and includes diplomatic and consular officials.

(4) Grading. An offense under subsection (1)(a) is a Class ~~A~~ B misdemeanor. An offense under subsection (1)(b) is a Class ~~B~~ A misdemeanor.

(5) Jurisdiction.

(a) There is federal jurisdiction over an offense of impersonation of a public servant, present or former, defined in this section when the public servant is a federal public servant.

(b) Federal jurisdiction over an offense of impersonation of a foreign official defined in this section extends to any such offense committed anywhere within the United States or the special maritime or territorial jurisdiction as defined in section 210.